

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EDYTHE ERDMAN and DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE, Jamaica, N.Y.

*Docket No. 96-1674; Submitted on the Record;  
Issued June 11, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant is entitled to disability compensation after June 8, 1992 due to her employment-related injury.

On October 15, 1990 appellant, then a 60-year-old paralegal specialist, filed a notice of traumatic injury, claiming that she hurt her knee when she tripped and fell on loose carpeting near her desk. The Office of Workers' Compensation Programs accepted the claim for internal derangement of the right knee with loose bodies. Appellant did not stop work.

Subsequently, appellant underwent arthroscopic surgery on January 21, 1992 and received continuation of pay through February 7, 1992 when she retired. Appellant elected disability compensation rather than a retirement annuity and submitted medical evidence in support of her claim.

Dr. Burton L. Berson, a Board-certified orthopedic surgeon who performed the surgery, stated in a treatment note dated April 30, 1992 that appellant would be able to return to work in three weeks. Dr. Berson completed Form OWCP-5 dated June 8, 1992, stating that appellant could work for eight hours a day, sitting and walking, with intermittent lifting, bending, and standing and no lifting more than 50 to 75 pounds.

On September 16, 1992, however, Dr. Berson stated that appellant had recuperated slowly from the surgery, which included removal of a loose body and chondroplasty for tri-compartmental degenerative joint disease, which was "quite severe." The physician noted that because of a degenerative knee, appellant's age, and other medical problems, including polycythemia,<sup>1</sup> she had not returned to her job. Dr. Berson added that appellant was disabled

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<sup>1</sup> Polycythemia is defined as an increase in the total red cell mass of the body. *Dorland's Illustrated Medical Dictionary* (27th ed. 1988).

and unable to return to work due to persistent pain in her knee, inability to bear weight, and restricted motion despite post-surgery rehabilitation.

By letter dated November 4, 1992, the Office asked Dr. Berson to clarify whether appellant's disability was due to the accepted condition of internal derangement of the knee and whether this condition alone would render her totally disabled so long after surgery. The Office repeated its request on December 8, 1992.

Dr. Berson responded on January 15, 1993, stating that the chondroplasty was necessary to smooth the joint surfaces because of severe degenerative arthritis of the right knee and that appellant's recuperation was severely delayed because of the arthritis as well as other physical problems. Dr. Berson added that appellant had persistent pain and could not walk for any period of time. He could not predict any return to work and recommended that she continue to receive disability compensation.

On April 5, 1993 the Office informed appellant of Dr. Berson's report that her delayed recuperation from the surgery was caused by severe arthritis, which was not accepted as resulting from the October 1990 fall. In response, appellant submitted an April 21, 1993 letter from Dr. Berson, who stated that appellant was disabled at this time due to the knee injury, which caused large loose osteochondral bodies in the knee. These subsequently became arthritic and required surgery. Dr. Berson concluded that because appellant had no previous knee problems, her present condition "most likely" dated from the October 1990 injury, which caused her present disability.

The Office referred the medical records to the Office medical adviser who opined that appellant's partial disability was due to a job-related condition but that she should be able to work within the restrictions imposed by Dr. Berson. The Office then referred appellant, along with a statement of accepted facts, a list of questions, and the medical records, to Dr. Harold A. Kozinn, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence.

On October 26, 1993 Dr. Kozinn reported on his July 12, 1993 examination of appellant. He diagnosed osteoarthritis of the right knee, noting that the magnetic resonance imaging (MRI) scan of April 22, 1991 revealed a tear of the posterior horn of the medial meniscus as well as a loose body and a Baker's cyst. He found that appellant had an asymptomatic pre-existing arthritic condition, which was aggravated by the 1990 injury, resulting in permanent partial disability. Dr. Kozinn concluded that while appellant could work a full day, she should avoid the activities as checked off on the OWCP-5 form.

On January 27, 1994 the Office denied the claim on the grounds that the medical evidence established that appellant was able to return to work effective June 8, 1992. The Office relied on the opinion of Dr. Kozinn that appellant could work a regular eight-hour day within the restrictions imposed by Dr. Berson.

Appellant timely requested a written review of the record on the grounds that her job was not sedentary but required lengthy periods of time on her feet and movement from one office to another. Appellant added that Dr. Berson's changed opinion about her condition reflected the

steady worsening of her knee problem and that she had no pre-existing arthritic condition, as found by Dr. Kozinn.

In a decision dated May 9, 1994, the hearing representative remanded the case for further development of the medical evidence on the grounds that the Office failed to provide Dr. Kozinn with a description of the duties and physical requirements of appellant's paralegal job. The hearing representative directed that the Office supplement its statement of accepted facts and ask Dr. Kozinn for his opinion on whether appellant was disabled after May 21, 1992 due to her work-related knee condition and, if so, whether the disability continued at the time of his July 12, 1993 examination.

On remand, the Office asked the employing establishment to provide the necessary information regarding appellant's paralegal position. By letter dated August 30, 1994 the employing establishment stated that appellant's position was "not primarily a sedentary one," but required the individual to get up from a desk to photocopy documents, retrieve cases from a file room, kneel and bend to pull files from cabinets, and walk throughout the building to discuss cases with other personnel. The employing establishment added that while a definite time frame for each activity could not be ascertained, a good estimate would be that half the work day would be spent in these activities.

On September 22, 1994 the Office again referred appellant's case record, a list of questions, and an amended statement of accepted facts to Dr. Kozinn for review. The Office asked Dr. Kozinn to answer two questions: Was appellant disabled from performing her job after May 21, 1992 due to the 1990 work injury and, if so, was that disability present when he examined appellant on July 12, 1993.

By letter dated November 28, 1994, Dr. Kozinn stated that he had reviewed the entire record and that, in light of the additional information regarding appellant's job, he found "no reason to change" his opinion from that expressed in his October 26, 1993 report.

On December 19, 1994 the Office denied appellant's claim for disability compensation after June 8, 1992 on the grounds that the weight of the medical evidence established that appellant was able to return to work. On December 13, 1995 appellant requested reconsideration on the grounds that Dr. Stanley W. Bleifer, a Board-certified orthopedic surgeon whom appellant had consulted regarding a schedule award,<sup>2</sup> stated that she was unable to work and that Dr. Kozinn's statements regarding her ability to work were contradictory and inconsistent.

On March 13, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of the prior decision. The Office found that Dr. Kozinn's opinion was entitled to the special weight accorded impartial medical examiners and that Dr. Bleifer failed to provide any explanation for his comment that appellant was unable to return to work.<sup>3</sup>

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<sup>2</sup> On December 22, 1995 appellant received a schedule award in the amount of \$7,927.20 for a five percent permanent partial impairment of her right lower extremity.

<sup>3</sup> In its decision, the Office noted "two versions" of Dr. Bleifer's report in the record, commenting that the later

The Board finds that this case is not in posture for decision because of a conflict in the medical opinion evidence and thus must be remanded for further evidentiary development.

Section 8123 of the Federal Employees' Compensation Act<sup>4</sup> provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.<sup>5</sup> However, the Board has held that the medical opinions must be of relatively equal weight for a conflict to arise, and in assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality.<sup>6</sup>

In this case, the Office properly found a conflict in the medical opinion evidence between the Office medical adviser and Dr. Berson, who initially found appellant able to return to work but later stated that her knee condition had not improved as expected. Therefore, the Office referred appellant to Dr. Kozinn to resolve the conflict. Dr. Kozinn found appellant able to work an eight-hour day but added that she should "avoid the activities as checked off on the OWC P-5."

This form, a Work Restriction Evaluation, asks the physician to check the frequency and number of hours a day a claimant is able to do the specified activities. In completing the form, Dr. Berson checked "continuous" sitting and walking, and "intermittent" lifting, bending, and standing. However, he failed to indicate the number of hours appellant was able to do these activities or to check whether she was capable of the other specified activities—squatting, climbing, kneeling, and twisting. Thus, the Board finds that Dr. Kozinn's October 1993 report advising avoidance of the checked activities is unclear. Is appellant to avoid continuous sitting and standing or intermittent lifting, bending, or walking. Or is she to avoid the activities not checked at all?

Following the hearing representative's remand of this case, the Office received a letter from the employing establishment stating that appellant's job was not sedentary, but rather required that she walk, kneel, bend, and lift at least half of the work day. Informed of these requirements, Dr. Kozinn responded only that he found so reason to change his opinion. However, he did not discuss any of the physical demands of appellant's work, specifically, whether her knee condition would prevent her from performing her job in light of these duties.

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report had "an element of pandering" to appellant because it stated that she was unable to return to work. The Board notes that the September 15, 1995 report addressed to the Office appears to have been stamp-signed by the physician, whereas the undated version of the same report, with the additional comment that appellant was unable to return to work, was unsigned.

<sup>4</sup> 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. §8123(a).

<sup>5</sup> *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

<sup>6</sup> *Connie Johns*, 44 ECAB 560, 570 (1993).

Given this analysis, the Board finds that Dr. Kozinn's opinion that appellant was able to return to work is not well rationalized and is therefore not entitled to the special weight accorded to an impartial medical examiner.<sup>7</sup> Inasmuch as his bare opinion has as much diminished value as the lone statement of Dr. Bleifer that appellant cannot return to work, the Board finds that there is a conflict in the medical opinion evidence. Pursuant to section 8123, the Board therefore remands this case for further evidentiary development.

On remand, the Office should refer appellant, the case record, and the statement of accepted facts to an appropriate medical specialist for an impartial evaluation pursuant to section 8123(a).<sup>8</sup> After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The March 13, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
June 11, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> See *George S. Johnson*, 43 ECAB 712, 716 (1992) (finding that a conflict in the medical opinion was not resolved because the opinion of the referee physician was insufficiently rationalized; thus, further remand was required); *Robert P. Johnson*, 43 ECAB 260, 266 (1991) (same).

<sup>8</sup> See 20 C.F.R. §10.408; *Debra S. Judkins*, 41 ECAB 616, 620 (1990).